United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7454 76-7480

42-1

B P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

BIG SEVEN MUSIC CORP. and ADAM VIII, LTD.,
Plaintiffs-Appellants,
against

JOHN LENNON, APPLE RECORDS, INC., HAROLD SEIDER, CAPITOL RECORDS, INC. and EMI RECORDS LIMITED,
Defendants-Appellees,
and

MORRIS LEVY,
Additional Defendant on Counterclaims-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT MORRIS LEVY

NEMEROFF, JELLINE, DANZIG, PALEY, MANDEL and BLOCH
Attorneys for Additional Defendant on Counterclaims-Appellant Morris Levy
350 Fifth Avenue
New York, New York 10001
(212) 947-6760

MELVYN ALTMAN,
Of Counsel

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

TABLE OF CONTENTS

TABLE OF CASES

FEDERAL RULES

OTHER AUTHORITY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BIG SEVEN MUSIC CORP. and ADAM VIII, LTD., Plaintiffs-Appellants, -against- JOHN LENNON, APPLE RECORDS, INC., HAROLD SEIDER, CAPITOL RECORDS, INC. and EMI RECORDS LIMITED, Defendants-Appellees, -and- MORRIS LEVY, Additional Defendant on Counterclaim-Appellant.	:	Docket No. 76-7454 76-7480

REPLY BRIEF FOR APPELLANT MORRIS LEVY

This reply brief is submitted on behalf of Additonal Defendant on Counterclaim Morris Levy ("Levy") in response to the joint brief of defendants-appellees John Lennon ("Lennon"), Harold Seider ("Seider") and Apple Records, Inc., ("Apple").

Levy respectfully joins in the separate reply brief of Big Seven and Adam VIII which seeks a reversal of Judge Griesa's decision that there was no enforceable oral agreement.

If this Court should nevertheless affirm Judge Griesa's decision on the oral agreement, then Levy respectfully requests that the judgment on Lennon's counterclaim be reversed.

As noted in our main brief, Levy seeks such reversal on behalf

of himself and Adam VIII, a company of which he is president and the controlling shareholder. Levy does not claim that he is entitled to a reversal for any reasons different from those urged by Adam VIII and submits that the grounds for a reversal are equally applicable to both appellants.

THE FACTS

Since Lennon has not presented a separate Counterstatement of Facts relating to his counterclaims, but has discussed such facts in the context of his legal argument, we will do the same in this reply brief.

REPLY TO POINT VII OF DEFENDANTS' BRIEF
(Relating to the compensatory damages for alleged lost sales and Capitol's price reduction

Except for a brief discussion in a footnote on page 64 of his brief, Lennon virtually ignores the critical causation question discussed at pages 17-18 of Levy's main brief. In that footnote Lennon somewhat reluctantly acknowledges the "necessary, immediate and direct" test laid down by the Supreme Court in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931), but suggests that the Court also postulated an alternative test - that the damage be the "natural and probable" consequence of the tort.

A close examination of Story Parchment clearly shows that Lennon has misread the Court's opinion. The Court's reference to "natural and probable" was exclusively in the context of determining the amount of plaintiffs' damages. And, as we noted in our main brief, Story Parchment specifically articulated this very distinction:

"It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount." (Id. at 562.)

At page 39 of his brief, Lennon's very first argument in support of the $100,000 damages awarded to him by Judge Griesa for allegedly lost royalties, is a contention that certain allegations made by plaintiffs in their pleadings justify the damages awarded on defendants' counterclaims. We submit that this argument is ill-founded and specious.

In the first place, Lennon's reliance on plaintiffs' allegations of damages does not help him on the threshold issue of causation. If plaintiffs were to prevail on the oral contract issue, they would have no difficulty in proving that their failure to sell more than 1,270 "Roots" albums was the necessary, immediate and direct consequence of Lennon's and Apple's breach of the October 1974 contract and defendants' admitted interference with plaintiffs' suppliers and television stations. Plaintiffs' only burden at that point would be to prove the <u>amount</u> of lost sales, as to which the standard of proof is lower than as to causation.

Defendants, on the other hand, must first prove (1) that they lost sales and (2) that the release and promotion of "Roots" was the necessary, immediate and direct cause of such lost sales before they can even reach the issue of the amount of damages.

Turning to the other aspects of plaintiffs' allegations, referred to by Lennon, it is true that Levy claimed that a television package should be exclusive in order to be successful. The reason for this

is obvious from the record. If a television package is offered to the public at a fixed price of $4.98 (which was the price charged by Adam VIII for "Roots"), it cannot compete against an identical album sold through regular retail channels at a retail price of $3.66 to $4.79 (which is the retail price that is generally charged for a so-called "$6.98" album) (A.2579; 2678-2679; 2682; 2702).

But it does not follow, as Lennon suggests, that the reverse is also true. A retail album selling at retail prices of $3.66 - $4.79 can certainly compete effectively against a fixed-price $4.98 television album.

It was precisely this fact which caused plaintiffs originally to assert a claim of predatory price cutting against defendants for reducing an already lower price to a still lower price. Plaintiffs withdrew this claim prior to trial only because a charge of predatory price cutting is difficult to prove, since it requires a showing of improper intent, and the plaintiffs felt that such an issue might distract the jury from more significant issues in the case.

Moreover, while Levy insisted on an exclusive for the television package because a non-exclusive could have resulted in confusion between the TV album and a simultaneously released regular retail album, there was no such confusion in the case at bar. Adam VIII's commercials for "Roots", it should be recalled, were forced off the air by February 17, 1975, only four days after "Rock 'n' Roll's" release, so there was virtually no overlapping. And, as we show below, not only did defendants fail to prove confusion but they now concede, as they must, that the trial judge did not even make a finding of confusion. (Defs' Br. p.46.)

Lennon also claims, at page 40 of his brief, that Adam VIII and Levy engaged in a "high-risk gamble" because they failed to call any witnesses to rebut defendants' proof on their counterclaims.

The reasons we did not call any witnesses were simply these:

1. Defendants had the burden of proving actual confusion. Except for hearsay and double hearsay testimony by Capitol executives, Lennon and Marsh (whose testimony is analyzed at pages 13-14 below), defendants presented no evidence of confusion.

What witnesses should Adam VIII and Levy have called to prove a negative?

Moreover, while we did not call any witnesses, we did offer other evidence to rebut defendants' claims. For example, on the issue of "Rock 'n' Roll's" sales, it was Adam VIII and Levy who subpoenaed and offered Capitol's sales figures showing that during the first few weeks (the period of greatest sales impact according to Capitol), sales to Capitol's customers were very high (PX 233 at E 179). On the critical question of "Rock 'n' Roll's" sales to consumers, defendants' witnesses and Capitol's lawyer admitted (A. 2821, 2837, 2829) they had no sales figures at all (a truly remarkable admission for people who were claiming millions of dollars of lost sales). It was Adam VIII and Levy who introduced into evidence the national charts which showed that Capitol's album had also done exceedingly well on the consumer level. (See pages 27-28 of Levy's main brief.)

2. On the price reduction issue, when Capitol's own witness, Zimmerman, conceded that a Capitol retail album with a regular suggested retail price of $6.98 would in fact sell to consumers at an actual

retail price of $3.66 - $4.79 (A. 2579-2580, 2682), what witnesses should we have called to establish the obvious fact that a $3.66 - $4.79 price range is already lower than the fixed television price of $4.98 and that it was not necessary to lower the price of the Capitol album still further to compete against a $4.98 television album?

We submit that defendants, who had the burden of proof on these issues, utterly failed to meet that burden and that Judge Griesa should have dismissed their counterclaims for failure of proof instead of awarding total compensatory damages for lost sales and price reduction of $354,800, of which $100,300 was awarded to Lennon, whose counsel had not even requested such damages but who had limited his demand to an accounting of Adam VIII's profits and injunctive relief.*

Turning to Lennon's other arguments:

---

* Although Lennon argues that this contention by Levy and Adam VIII (which is set forth at length at pages 19-20 of Levy's main brief) is incorrect, we submit that Lennon's attempted explanation at page 4 of his brief is without merit. While it is true that the trial judge initially talked generally about the injuries all of the defendants claimed to have sustained, he then focused on their individual claims, at which time Lennon's counsel clearly stated that Lennon was not seeking damages for lost royalties (A. 2344a35). Moreover, when plaintiffs and Levy moved pursuant to Rules 52(b) and 59(a) of the Federal Rules of Civil Procedure to vacate or modify the district court's findings and conclusions and for a new trial (2072), the district court specifically rejected the notion that the defendants were to receive a collective award which they were to divide among themselves in proportion to their respective claims (A. 4227). The fact that Adam VIII and Levy did not raise this issue on their motion does not preclude them from raising it on appeal. It is hornbook law that:

> ". . . neither a request for findings, nor a motion under Rule 52(b) is a prerequisite to appellate review of the district court's findings of fact, conclusions of law, and judgment" (5A Moore's, Federal Practice, ¶52.11[4] at 2761 (1975 ed.) (footnote omitted),

and plaintiffs' and Levy's counsel, in their motion papers, clearly advised the district court and the defendants that:

A. Capitol's Rush

Although defendants devote 9 pages of their brief to their argument that plaintiffs had difficulty formulating the terms of the 1974 agreement because plaintiffs originally pleaded a grant of "world-wide" rights and then, at trial, limited their claim to United States mail order rights (an argument which plaintiffs discuss in detail at pages 8-12 of their reply brief), Lennon ignores the fact that none of the defendants, either in their pleadings*, or at any time prior to the presentation of their case on their counterclaims, claimed that Capitol had to rush the release of "Rock 'n' Roll" as a consequence of the release of "Roots". Indeed, when Bhaskar Menon, Capitol's President, was asked during his deposition (taken in May, 1975, three months after the decision to release "Rock 'n' Roll") whether Capitol rushed "Rock 'n' Roll's" release, he testified:

> "I cannot recall that we may have, that we expedited it [the Capitol album] to any unusual degree. We probably did, but I am not - there is nothing clear in my mind about that having been a dominant factor." (A. 2473.)

(footnote continued from previous page)...

> "Adam VIII and Levy do not intend to raise in this motion all of the errors which they or Big Seven Music Corp. believe this Court has made during the course of trial or in its findings of fact and conclusions of law, and they specifically reserve the right to raise any such errors when they take an appeal to the Court of Appeals, irrespective of whether such errors have or could have been raised herein." (A2102)

* For example, Capitol's amended counterclaim, which was filed on October 23, 1975, eight months after the release of "Rock 'n' Roll", made no reference to "rush" and alleged only that Capitol lost sales as a result of plaintiffs' and Levy's allegedly "unauthorized, deception and confusion - producing acts" in connection with releasing "Rock 'n' Roll" (75a). Lennon's amended counterclaim referred to neither confusion nor rush (130a-132a).

1. The Effect on Promotional Items (Def. Br. p. 41)

Lennon argues that defendants established a causal connection between the slight delays and reductions in the delivery of promotional items* through the testimony of Lennon's expert, David Marsh, an associate editor of Rolling Stone Magazine. Lennon ignores Marsh's admission at trial that "Rock 'n' Roll" did quite well initially (A. 3316), during the very period when the promotional material was not available in full strength, and failed later because:

> "...the people heard it and decided it wasn't good and created negative word of mouth or as many people as there are in the world interested in the Lennon Rock and Roll album had already bought it." (A.3318.)

2. Capitol's Plan for Television Advertising (Def. Br. p.42)

Lennon argues that in the fall of 1974 Capitol planned a $150,000 televison campaign which it was precluded from implementing. We submit that Zimmerman's vague testimony that this is something he had in mind at a time when Capitol did not even know that Lennon would complete the long-delayed "oldies" album and that Zimmerman had discussed his idea with unidentified people (A.2651-2652) was certainly not sufficient to carry defendants' burden of proof. Even after Judge Griesa pointedly criticized defendants' evidence on this issue as "extremely vague" (A.2659), neither

---

* We again note that Defendants' Exhibit CX (E 397) was not an original document but a reconstruction prepared by defendants during the trial in response to Judge Griesa's repeated prodding to come up with documentation of their alleged marketing plan (A. 2659-2667). Defendants never did produce the written "marketing plan" which they at first claimed existed (A.2627-2628). Moreover, they admitted that no changes were made in the marketing and promotion plan approved by Lennon on January 28, 1975 (PX 102, ¶94 at E 133-134; A. 2628) and that all components of the plan were included (A. 2631-2632).

Zimmerman nor any other witness for defendants offered more concrete proof on this issue. Zimmerman merely repeated the same vague testimony (A. 2773-2776).

3. The Use of Radio Advertising (Def.Br. p.43)

Although Lennon now contends that radio is "an inferior substitute" for television, David Marsh, Lennon's own expert witness, testified that:

"Radio is a crucial factor in selling records." (A. 3303.)

The reason radio is so important, Marsh explained, is that:

> "...the average consumer uses the radio as his sampling device. Records are not played in record shops any more; record shops won't play records for you any more. You can't sample them. So radio becomes the great sampling device in America for people to make their selection of records." (A.3304.)

Zimmerman, Capitol's marketing executive, admitted that despite the alleged delays, "Rock 'n' Roll's" radio advertising was adequate (A. 2777), and Marsh testified that disc jockeys will automatically play a new Lennon album, irrespective of whether the record company promotes it, because "they know people want to hear it, and what they are interested in doing is attracting listeners to their stations." (A. 3305.)

Moreover, Lennon's argument that an alleged 10-day delay in the radio spots adversely affected the sales of "Rock 'n' Roll" is simply not borne out by the customer or consumer sales figures. (See pages 27-28 of Levy's main brief.)

4. Advertisements in Billboard, Cash Box and Record World (Def. Br. p.44)

Again, the initial sales figures do not support Lennon's contention that the delay in placing the advertisements hurt the sales.

Although Lennon now contends that "Rock 'n' Roll's" advertisements in the trade publications were less effective because they were in two rather than four colors (Defendants' brief, p. 44), when Marsh was asked whether that would have adversely affected sales, he candidly admitted:

"I don't know. I don't suppose so." (A.3332.)

5. The Album Cover (Def. Br. p.44)

Although Lennon now claims he would have put out a better cover if he had not been rushed, Capitol's Zimmerman testified that the quality of the cover was satisfactory (A. 2644) and the evidence shows that the cover that was finally used was planned and approved by Lennon and the Capitol cover specialists on January 28, 1975, well before Capitol made its alleged "rush" decision on February 7 or 8, 1975 (PX 102 at E 134; A.2628; A.2631-2632).

Lennon's argument at pages 45-46 that the "rush" affected Capitol's marketing plan ignores defendants' own admissions that no changes were made in the plan approved on January 28, 1975 and that all components of the plan were included (PX 102 at E 134; A.2628; A.2631-2632).

Lennon's quotation at page 46 of Zimmerman's testimony that

> "There was nothing there [in the record stores] at the day of release. We needed that absolute impact" (A.2814),

is particularly misplaced in view of the overwhelming evidence, discussed at pages 27 and 28 of Levy's main brief, that "Rock 'n' Roll" did extremely well on the customer and consumer level during the several weeks following the day of release - proof that the slightly delayed tee shirts, posters,

buttons, etc., did not have any adverse impact on sales.

B. Defendants' Alleged Evidence of Confusion (Def. Br. p.46)

At the top of page 46 of his brief, Lennon admits that there is no way of telling how to apportion the claimed loss of sales between the alleged "rush" and the alleged confusion. We agree because we do not believe that defendants proved that either the alleged "rush" or the alleged confusion resulted in any loss of sales whatsoever, except possibly to the customers of the 1,270 "Roots" album sold by Adam VIII. And even as to those there was no proof that any of them would have bought "Rock 'n' Roll" were "Roots" not available. "There is no presumption of law or of fact that a plaintiff would have made the sales that the defendant made." Ronson Art Metal Works v. Gibson Lighter Mfg. Co., 3 A.D. 2d 227, 159 N.Y.S.2d 606, 611 (1st Dept. 1957).

Turning to the confusion question, we note that Lennon has a grave problem with this issue.

Capitol, which carried the ball for all defendants on the lost sales issue, had argued during the trial (in a brief filed on March 30, 1976) that confusion was "the source of most of the damage ultimately sustained by defendants..."

However, at trial defendants were unable to present any evidence of confusion other than hearsay and double hearsay testimony by Capitol executives, Lennon and Marsh (whose very equivocal testimony is analyzed at pages 13-14 of this brief).

Lennon now faces the following dilemma:

On the one hand, he admits at page 46 of his brief that the district court did not base its decision on consumer or customer confusion. Since the primary thrust of defendants' case for lost sales was their claim of confusion, it is significant that even the trial judge evidently rejected defendants' claims in this regard.

Yet, at the same time, Lennon would like to resurrect the confusion issue to support the district court's award of $194,068 for lost sales (of which $59,568 was awarded to Lennon).

To do this, Lennon has to argue that Zimmerman and Lennon (two highly interested parties and fact witnesses) were, in fact, testifying as "experts" and therefore had a right to give hearsay testimony on how unidentified customers and consumers may have been confused

Leaving aside the fact that neither Zimmerman nor Lennon were identified as expert witnesses in pre-trial proceedings or during the trial, we submit that it would make a mockery out of the rules of evidence to hold that an interested party can support his claims for damages by presenting his own hearsay testimony on critical fact issues and having it admitted simply by claiming that he is an "expert" on these issues.

Although Lennon seeks to imply that Judge Feinberg, in Zippo Manufacturing Co. v. Rogers Imports, Inc., 216 F. Supp. 670 (S.D.N.Y. 1963), expressed approval of the practice of permitting experts to testify about the public's belief, the fact is that Judge Feinberg clearly stated that he found such testimony far less credible than scientifically conducted surveys (Id. at 683-684).

Lennon's reference to Falcon Industries v. R.S. Herbert Co., 128 F. Supp. 204 (E.D.N.Y. 1955), is also misleading. While it is true

that the district judge did admit opinion evidence on the question of the likelihood of confusion, his finding of actual confusion was based on hard and direct evidence of customer confusion, including: (a) testimony of nine witnesses that upon first looking at the defendants' product, they thought it had been manufactured by the plaintiff; (b) both distributors and consumers returned defendant's product to plaintiff for repair or replacement of parts; (c) thirty letters were received by plaintiff from distributors and consumers requesting repair or replacement of defendant's product; (d) a retail store ran advertisements for plaintiff's product which actually carried a picture of defendant's product; and (e) the sale by a retailer to a customer of defendant's product when plaintiff's was requested. No such evidence was offered in the case at bar.

Even if we accept defendants' argument that their hearsay evidence was admissible and that our objections should go only to its weight, we submit that the weight of this testimony (which named no names and supplied no facts) was so negligible that it deserved to be disregarded entirely.

The only expert witness for defendants on this issue was David Marsh, an associate editor of Rolling Stone Magazine.*

Marsh testified, in answer to the question of whether he had heard "generally in the industry that there was confusion as to the 'Roots'

---

* Defendants' other expert witness, Petty, limited his testimony to explaining the statistical methods employed to show how many viewers might have been reached by the television commercials for "Roots". He estimated 800,000 viewers but conceded his estimate might be overstated by 1100 percent (A.2612) and that he had no way of telling how many people actually saw the "Roots" commericals (A.2617). The plain fact remains that only 1,270 "Roots" albums were sold.

album", that he remembered "asking people questions" (A.3274). When pressed for details, he identified those "people" as Greil Marcus, a music critic for the Village Voice and Rolling Stone, and John Landau, the records editor of Rolling Stone (A. 3275-3276).

On cross-examination, Marsh conceded that at the time of his discussions with Marcus and Landau, he had not even heard the "Roots" album or seen a television commerical for it, and that to the best of his knowledge neither had Marcus nor Landau (A.3285-3287).

At no time did Marsh testify that he had spoken to any wholesaler, retailer, customer or consumer who had told Marsh that he had been confused by "Roots".

In seeking to support Judge Griesa's award of damages for lost sales, Lennon is in the awkward positon that he cannot even urge that the trial judge believed Zimmerman, Lennon and Marsh on the issue of confusion and that this Court should not overturn the trial judge's findings on credibility because, as Lennon himself admits at page 46 of his brief, the trial court made no findings with respect to customer or consumer confusion.

We note in passing that defendants, after reading the cases discussed at page 22 of Levy's main brief, have evidently abandoned the argument they made below that they were not required to prove actual confusion but merely had to show a likelihood of confusion in order to recover damages. Lennon makes no mention of that argument in his brief on this appeal.

To recapitulate the confusion issue:

1. Defendants originally pleaded only confusion.

2. In their trial brief, defendants still claimed that confusion was "the source of most of the damage ultimately sustained by defendants..." (Capitol's brief of March 30, 1976, p. 2).

3. Defendants presented no evidence of confusion.

4. The trial court made no findings with respect to confusion.

This is probably one of the few, if not the only unfair competition case in history where the sale and advertising of one product is alleged to have resulted in a loss of sales for another product and where a trial judge has awarded almost $200,000 of compensatory damages for such loss of sales without a single finding of confusion.

C. The District Court's Assessment of Capitol's Loss of 100,000 Sales (Def. Br. p.49)

1. The Basis for the District Court's Award (Def. Br. p.50)

Lennon points out that Judge Griesa did not rely on any of the averages or projections offered by defendants (except for the Canadian-based projection discussed below) and that the trial judge based his estimate that "Rock 'n' Roll" should have sold 442,000 units (instead of the 342,000 units it did sell) on the 425,000 sales of "Walls and Bridges" as one "benchmark" and on Capitol's Canadian-based projection of 520,000 units as another "benchmark" (A.3469).

Lennon seems to suggest that since the trial judge stated in his decision that he had considered the effects of the economic recession,

the unfavorable critical reviews of "Rock 'n' Roll" and the fact that "Rock 'n' Roll" was not a characteristic Lennon album, these are not valid issues to raise on appeal. We submit that just because evidence was presented to the trial judge and considered by him hardly immunizes the trial court decision from appellate review.

While Judge Griesa did mention these three areas of evidence in his decision (A.3468), he never explained why he chose to disregard them. We are thus left with the following state of the record:

1. The evidence shows that "characteristic" Lennon albums, such as "Walls and Bridges" (425,000), "Mind Games" (376,000), "Imagine" (1,553,000), and "John Lennon with Plastic Ono Band" (702,000), sold considerably better than "uncharacteristic" Lennon albums, such as "Sometime in New York City" (164,000), "Wedding Album" (22,500) and "Unfinished Music No. 2" (51,500).* (See PX 110 at E 153 and A. 2987.)

2. Lennon admitted that "Rock 'n' Roll" was not a "characteristic" Lennon album (A. 3181, 3182).

3. The critical reviews of "Rock 'n' Roll" were virtually all terrible (see page 34 of Levy's main brief), just as Lennon himself had feared when he expressed the desire to bypass the critics by having Levy issue the album as a television package (Lennon, A.710, 1911). "Walls and Bridges", on the other hand, enjoyed favorable critical reviews (Zimmerman, A. 2644).

4. The 342,000 sales of "Rock 'n' Roll" were 19.5% less than the 425,000 sales of the earlier "Walls and Bridges" album - a percentage

---

* "Live Peace in Toronto" (389,000) was a mixed bag - half straight rock and rolls songs (some composed by Lennon himself) and half "avant garde" (A. 3178-3179).

drop which falls squarely within the overall decline of Capitol's sales due to the economic recession at the time "Rock 'n' Roll" was released (A.2536). Capitol's Zimmerman testified that Capitol's overall record sales declined 25% during this period (A.2707). Capitol's Posner testified that Capitol's record sales declined 14% during this period (A.3021, 3022). (Lennon's attempted rebuttal of this point is discussed at p.21, infra.)

In view of this overwhelming evidence of why "Rock 'n' Roll" did not do quite as well as "Walls and Bridges", we are simply unable to understand how Judge Griesa, after referring to these factors, could conclude that "Rock 'n' Roll" should have sold as well or even better than "Walls and Bridges". The trial judge did not explain this aspect of his decision and we submit it was just plain wrong and totally unsupported by and inconsistent with the evidence.

2. The Canadian Projections (Def. Br. p.51)

To the extent that Judge Griesa relied on the Canadian figures - and Lennon is just as ambivalent on the degree of such reliance (Def. Br. p. 50-52) as the trial judge was (compare A. 3469 with A.3839) - we submit that such reliance was completely unjustified.

No matter how Lennon now seeks to qualify Posner as an expert on Canadian sales, the fact is that Posner admitted that he was not personally familiar with Canadian retail prices (A.3032), Canadian advertising (A.3032), Canadian promotion methods (A.3033), Canadian tastes (A.3033-3037) and the state of the Canadian economy (A.3037).

Defendants' belated recognition of Posner's lack of competence to testify on these issues and their attempt to remedy these deficiencies by offering a last-minute telegram from Canada met with the rejection it deserved (A.3131).

If defendants regarded the Canadian comparison as critical - and Posner admitted that he thought of preparing such comparisons for the first time only while the trial was already in progress (Posner, A. 2908)* - it was up to defendants to present a witness who could lay a proper foundation for this evidence. Their failure to do so, particularly after being warned by the trial judge of his doubts concerning this evidence (A. 3129) and the trial judge's rejection of the telegram (A. 3131) should render the Canadian figures worthless.

To illustrate the danger of relying on comparisons between the United States and Canada without proper foundation, we point to the following examples which are taken from Capitol's own statistics:

1. While Lennon claims, at page 52 of his brief, that a "historical parallel" existed "between Canadian and American sales on Lennon's albums", the evidence shows that an album of a rock and roll concert by Lennon, which he recorded live in Toronto, attracted far less interest in Canada than in the United States (A.3035).

2. Similarly, Canadians, for some unexplained reason, liked both "Sometime in New York City" and "Mind Games" relatively better than "Imagine", which was a huge hit in the United States (A.3034).

3. Various artists sell considerably better in Canada than they

---

* A fact which disposes of Lennon's cavalier contention at page 55, footnote, of his brief that defendants did not furnish this information during discovery "because it had not been requested". Indeed, virtually all of the documentary evidence on which defendants relied to prove their counterclaims for damages, including their alleged promotion plan (which they never produced), seem to have been prepared while the trial was already in progress (A.2864-2867, A.2908) an indication that defendants had not really hoped to recover substantial damages on their counterclaims and were probably just as surprised by Judge Griesa's award of over $400,000 as Adam VIII and Levy were.

do in the United States (A.3036), a phenomenon which may have something to do with special Canadian tastes but which Posner was unable to explain.

As for Lennon's contention at page 55 that we claim we were "sandbagged" by Judge Griesa, that word is Lennon's and not ours. We certainly do not claim that Judge Griesa had the slightest intent to mislead counsel. We do contend, for the reasons set forth at pages 36-38 of Levy's main brief, that Judge Griesa took a very ambivalent position on the Canadian statistics and that the effect of his statement at A.3129, given the context in which it was made, justified the reliance of counsel for Adam VIII and Levy that the trial judge would give little or no weight to the Canadian figures.

3. Lennon's Prior Albums (Def. Br. p.56)

The reason we analyzed the averages of Lennon's prior sales was because a substantial portion of defendants' evidence at trial consisted of carefully selected and distorted averages of prior sales (DX DC at E 402; DD at E 403; DF at E 406; DG at E 407), which were not accepted by the trial court.

When it became clear that their averages would not stand up under close analysis, defendants shifted their ground and argued that what they were really talking about was the "momentum" of one album on another.

But, as the sales of Lennon's albums show on their face, "momentum" works only when one compares albums of a similar character.

As the Court will observe from the Lennon sales chart reproduced on page 6 of Levy's main brief,* when Lennon stuck to his "characteris-

* Defendants correctly point out that the chart on page 6 inadvertently switched the release dates of "Imagine" and "Sometime in New York City".

tic* albums ("John Lennon With Plastic Ono Band" and "Imagine"), he gained momentum. When he switched to an "uncharacteristic" album ("Sometime in New York City"), he lost momentum. When he switched back to "characteristic" albums ("Mind Games" and "Walls and Bridges"), he gained momentum. And when he released the uncharacteristic "Rock 'n' Roll" album, he lost momentum.

Defendants' reliance on Marsh's testimony that "Rock 'n' Roll" was "intrinsically more commercial" than "Walls and Bridges", is particularly ill-founded.

Marsh admitted that it was Lennon's own compositions that made him a great artist (A. 3322-3323), and "Rock 'n' Roll", of course, contained no songs written by Lennon. Moreover, Marsh testified that doing a rock and roll album was a risky thing for Lennon to do, because for the album to be a success, Lennon would have to render renditions superior to those of the artists who had originally made the songs famous (A.3230).**

This, even Marsh conceded, Lennon failed to do. Marsh admitted that his own review of "Rock 'n' Roll", which he and Lennon's counsel failed to produce, despite a direct order from Judge Griesa (A.3284), was "mixed" and but three sentences in length (A. 3283-3284). And Marsh further admitted that he knew of no favorable reviews in any major journals (A.3293).

---

* As we have previously pointed out, Lennon himself defined "characteristic" albums as albums containing his own compositions and admitted that "Rock 'n' Roll", which did not contain a single Lennon composition, was not a "characteristic" Lennon album (A.3181-3183).

** Lennon himself admitted that he was "taking a risk" when he made the rock and roll album and that there was no way of knowing if it would be his biggest or lowest seller (A. 3190-3191).

Indeed, Marsh's own magazine, "Rolling Stone", panned "Rock 'n' Roll", as did the "Village Voice" and "High Fidelity Magazine" (PX 201 at E 155; PX 200 at E 154; and PX 253 at E 191). (See page 34 of Levy's main brief, where excerpts of these reviews are set forth and discussed in greater detail.)

4. The reasons why "Rock 'n' Roll" sold 19.5% fewer albums than "Walls and Bridges" (Def. Br. p.58)

We have already discussed these reasons earlier in this reply brief. However, since Lennon's brief goes on to devote additional separate arguments to each reason, we will briefly reply to Lennon's additional points:

(a) The economic recession

While Posner tried to minimize the impact of the admitted 14-25% overall decline in Capitol's sales by arguing that its effect would be minimal in the case of an artist like Lennon, defendants produced no figures to support this naked assertion and Posner did not explain whether his argument would be equally applicable to an uncharacteristic Lennon album which, according to Lennon's expert, Marsh, sold poorly either because "the people heard it and decided it wasn't good" or because there was a limited demand for a rock and roll album recorded by Lennon (A.3318).*

* It is significant that Capitol's president, Menon, when explaining the reasons for reducing the price on "Rock 'n' Roll", also pointed to the uncharacteristic nature of the album:

"The second consideration was the fact that all the titles or none of the titles, compositions recorded on this particular album were original new compositions that had not been exposed in terms of performance by other artists to the public before. In fact, they had been exposed for public sales by performance of other artists of those compositions." (A.2489.)

Moreover, Menon admitted that one of the reasons why Capitol reduced its price for the Lennon album was "the condition of the market place, especially as it seemed to affect Capitol sales." (A. 2488-2489.)

(b) The fact that "Rock 'n' Roll" was not a "characteristic" Lennon album (Def. Br. p.59)

Lennon does not really deny that "Rock 'n' Roll" was not a characteristic Lennon album. Instead, he argues, at page 59 of his brief, that because Levy and Lennon anticipated sales of millions of albums if the Lennon record was offered as a television package, it must follow that the album should have sold equally well when Lennon - contrary to his own initial instincts - was persuaded by Capitol to sell the album through regular retail channels. This argument is completely fallacious. The record shows that the reasons Levy and Lennon expected far greater television sales were:

1. because television packages cater to the re-release of "oldies" (Pang, A.1499; Levy, A.147-148).

2. because television would enable Lennon to reach a different audience from the one that buys his records through regular retail channels (Kahl, A.1306).

3. because a television package of "oldies" recorded by an artist of Lennon's stature would have been a television "first" (Seider, A.2006-2007).

4. because a television album would have bypassed the critics (Seider, A.2005-2006; Lennon, A.710).

(c) The Unfavorable Reviews (Def. Br. p.60)

Lennon argues that there was no testimony that the unfavorable reviews had a material effect on sales. However, Lennon himself testified that in October 1974 he was afraid to release the "oldies" album through regular retail channels because he feared that the critics would be hostile (Lennon, A.710; see also Seider, A.2006).

In an attempt to discount the significance of the unfavorable critical reaction which he himself had correctly predicted and which came to pass, Lennon is now forced to rely on the testimony of his expert, David Marsh, that critical reviews are not significant in terms of sales (A. 3308).

Lennon ignores the fact that Marsh, whose testimony shifted continuously, also testified that one function of rock music criticism is to serve as a "consumer guide" (A. 3222) and that:

> ". . .when you write a negative view, what you are really doing is articulating someone else's visceral negative response that they have in the thought, what you are doing, you are articulating the reasons why someone is not buying a record." (Emphasis supplied) (A. 3306-3307.)

Moreover, Marsh, in still another shift of position, admitted that he did not really know what impact criticism had on sales, since his magazine had never made any studies or surveys of the correlation between its reviews and consumer purchases (A. 3311).

Defendants also point to Marsh's testimony that "numerous readers" wrote to Rolling Stone Magazine insisting that "Rock 'n' Roll" was a "great record".

As was customary with all of defendants' witnesses, Marsh did not bother to identify a single one of these "numerous" readers. Since Lennon's lawyers had arranged four weeks before the damage trial for Marsh to testify as an expert (A. 3231-3232), it is indeed curious that no effort was made by Marsh or Lennon's lawyers to produce a single one of these allegedly favorable reader letters.

5. The Initial Sales at the Wholesale Level (Def. Br. p.61)

When Capitol's Zimmerman was finally forced to admit on cross-examination, after considerable fencing, that Capitol's initial sales (which Capitol and defendants did not offer in evidence and which plaintiffs and Levy had to subpoena) were quite strong (A. 2729-2736) (and we again note that Capitol's Mennon had insisted, in response to a question from his own counsel, that the greatest sales impact of an album is during the period immediately following its release), Zimmerman fell back on the argument that these were sales to Capitol's own "customers", i.e., dealers, distributors and retailers and did not reflect consumer sales and returns (A.2746-2747).

Judge Griesa seized upon this point and became quite impatient (see his remarks at A.2816 and again at A.3436, quoted at pages 62 and 63 of Lennon's brief) when counsel for Adam VIII and Levy, having succeeded in rebutting defendants' original claim that dealers were confused and not buying (A. 2728), tried to proceed to the next level in order to show that consumer sales were also heavy during the first few weeks - the period of greatest sales impact.

When defendants - who had the burden of proof on lost sales -

claimed that they had absolutely no figures on consumer sales (A.2829), Levy and Adam VIII introduced the national "charts", which are literally the bible of the record industry and which reflect how well an album is doing on the consumer level. The charts showed that during its early weeks "Rock 'n' Roll" had done extremely well.*

To recapitulate the state of the record on this important issue:

1. Defendants had the burden of proving lost sales.
2. Capitol's President Menon testified on direct examination that the reason the alleged "rush" hurt Capitol was because "the chief principal impact of an album on the market . . . its largest selling period" is "immediately upon release." (A.2553.)
3. Defendants argued that the confusion and "rush" hurt sales to customers and consumers.

---

* In a footnote on page 61 of his brief, Lennon accuses us of grossly distorting the record. We submit that it is Lennon's counsel who are doing the distorting.

Zimmerman admitted that a record that makes the "top 20" in the charts is "selling well" (A.2723).

Marsh admitted that the three charts are important guides of consumer sales and/or radio air play (Marsh A.3311, 3312).

Posner admitted that the charts are an important guide in the industry (Posner, A.3039-40).

As for Lennon's testimony, if the charts are meaningless (as he now contends) why does he bother reading them (A.3198)?

Even if one were to accept defendants' suggestion that the charts are not accurate, is it reasonable to assume - without evidence - that three charts prepared separately by three leading independent trade journals would all make the same error of showing "Rock 'n' Roll" doing better than it really was?

4. Capitol's sales figures showed that sales to customers did well during the first few weeks when the confusion and "rush" should have had their greatest impact, according to Menon.

5. Defendants admitted that they had absolutely no figures on consumer sales. Adam VIII and Levy then introduced evidence showing that the album did well among consumers during the first few weeks when the confusion and "rush" should have had their greatest impact, according to Menon.

6. Sales to both customers and consumers did not begin to fall off until several weeks after the release date by which time the album had been subjected to highly unfavorable reviews and to the type of "word-of-mouth" advertising among fans, which both Capitol's Posner and Marsh, Lennon's expert, regarded as very important (A.3023; A.3317-3318).

We do not think it is "idle speculation", as charged at page 61 of Lennon's brief, for us to contend that the unfavorable reviews and "word-of-mouth" advertising eventually convinced the Lennon fans that this was not a "characteristic" Lennon album and that sales thereupon fell 19.5% below the highly praised and completely characteristic "Walls and Bridges" album which had preceded "Rock 'n' Roll" - a percentage which coincides with the general drop in Capitol's sales during this recession.

Indeed, when Marsh was asked why, after "Rock 'n' Roll" climbed swiftly to near the top of the Billboard, Cash Box and Record World

charts when it first came out, then peaked in April or May of 1975 and started going downhill again, Marsh replied:

> "What would have caused it? Either that the people heard it and decided it wasn't good and created negative word of mouth or as many people as there are in the world interested in the Lennon Rock and Roll album had already bought it." (A 3318.)

We have read and reread Judge Griesa's decision and we are still unable to understand how on this state of the record he could have concluded that defendants proved, by a preponderance of the evidence, that the very brief promotion of "Roots" and even Capitol's alleged "rush" had the necessary, immediate and direct consequence of reducing Capitol's sales by 100,000 units and that "Rock 'n' Roll" should have done as well and even better than "Walls and Bridges".

D. The Alleged "$1.00" Price Reduction (Def. Br. p.63)

Even at this late stage in the case, Lennon's counsel persist in their misleading reference to Capitol's price cut as a "$1.00" reduction when defendant's own testimony established that the wholesale reduction was only $0.46 and the reduction on the retail level was only $0.16 (A.2579, 2678-2679, 2682, 2702).*

Counsel for Adam VIII and Levy did argue in summation, and still maintain, that Capitol's price reduction was not a necessary

---

* We are not contending that the trial court's computations of lost profits were based on a $1.00 differential. For computation purposes, Judge Griesa did use the wholesale price reduction. But for purposes of concluding that the price reduction was necessary, Judge Griesa followed defendants' suggestion and compared Capitol's suggested retail prices of $6.98 and $5.98 with Adam VIII's actual retail price of $4.98. (A.3463-3464.)

consequence of the release and promotion of the "Roots" album but was a conscious, predatory economic decision on the part of defendants which, as it turned out, was a wholly unnecessary case of attempted "overkill". As this Court stated in Pearlstein v. Scudder & German, 527 F.2d 1141, 1146 (2d Cir. 1975), it would be "unfair to charge [a tortfeasor] with the consequences of what developed to be poor judgment on the part of [the party claiming damages]."

Lennon argues, at page 64 of his brief, that the issue on this appeal is:

> "Does the record contain sufficient support for Judge Griesa's finding that Capitol's action was reasonable?" (Emphasis added.)

We submit that is not the issue at all. The issue is whether it was necessary - the requirement laid down by the Supreme Court in the Story Parchment case, supra.

We are still unable to comprehend why it was necessary for Capitol to reduce the price of an album which was already selling to consumers in a range of $3.66 - $4.79 in order to compete with a television album selling at a fixed price of $4.98 (plus postage and handling of $.75 to $.90 in the case of C.O.D. orders).

Judge Griesa's conclusion, quoted at page 65 of Lennon's brief, states but does not explain why the reduction was "necessary"; Lennon's brief proceeds to address itself to the alleged "reasonableness" of Capitol's price reduction but ignores the issue of whether it was "necessary".

1. Capitol's Knowledge of the $4.98 Price (Def. Br. p.65)

Lennon admits, at page 65 of his brief, that "Capitol knew

that historically the advertised price of mail order albums ranged from $3.88 to $4.98" but claims that Capitol did not know with any certainty that "Roots" would be offered for sale at $4.98.

That is an utter falsehood and distortion of the record. Menon said he knew that "Roots" would be sold at $4.98 (A.2383). Seider admitted that he knew it (A.2027). And, most important, Defendants' Amended Statement of Undisputed Facts admitted:

> "Also on February 1, Tillinghast [Capitol's house counsel] informed Wood [head of EMI] by telephone that Levy was planning to advertise the 'Roots' album on television at $4.98." (PX 102, ¶116 at E 138).

The first "Roots" commercials showing a price of $4.98 appeared on February 8, 1975 (A.342), five days before the release of Capitol's album.

2. Capitol's Need to Compete at the Wholesale Level (Def. Br. p.66)

Defendants' claim that Capitol feared its album would have to compete with "Roots" on the wholesale level because Adam VIII might sell "Roots" to wholesalers is simply ridiculous and contrary to the evidence.

In the first place, as defendants admit at page 13 of their brief, Levy explained to Seider and Lennon on October 8, 1974 - four months before "Roots" was offered for sale - that Adam VIII does not sell its TV packages through retail fulfillment centers until after the conclusion of the mail order campaign. And even if one were to suppose that Seider and Lennon (who is now seeking damages on this issue) failed to communicate this information to Capitol, it is inconceivable that Capitol, one of the largest record manufacturers and distributors in the United States, would not know how TV albums are merchandised.

Secondly, the price at which Adam VIII sells its $4.98 albums

to retail fulfillment centers (the "wholesalers" with whom Capitol would have to compete) is $3.73, thirty-seven cents more than the $3.36 wholesale price for Capitol's "$6.98" albums (A. 2579).* Consequently, even without a price reduction, the wholesaler would have a higher profit margin selling "Rock 'n' Roll" than selling "Roots".

3. Competition on the Retail Level (Def. Br. p.67)

It is Lennon, not Levy, who is being disingenuous when he suggests that a nineteen cent differential in price (in favor of "Rock 'n' Roll") would not be enough to induce a prospective customer to buy Capitol's album from a retailer rather than purchasing "Roots" through mail order.

Levy testified without contradiction that TV packages must be "tremendous buys" to attract customers (A.158, 159); that customers would not buy through mail order when they could get the record through a retail store (A. 158); and that the C.O.D. price to the buyer of a $4.98 mail order package was actually between $5.73 and $5.88, because of postage and handling charges (A.1704-1705).

Consequently, retail sellers of "Rock 'n' Roll" needed no wholesale price reduction in order to compete with "Roots" in the marketplace and Capitol's price reduction was neither reasonable nor necessary.

---

* Even if one were to use Graham's reconstructed notes (DX GGGG at E 491) on what Levy, on November 18, 1974, allegedly told Graham and Seider the costs were on a retail fulfillment album, the discount to the store is $1.50, or a price of $3.48 to the retail fulfillment center, still well above Capitol's $3.36 price.

REPLY TO POINT IV OF DEFENDANTS' BRIEF

(Civil Rights Claim)

It is striking that although Lennon describes at great length the alleged inferiority of Adam VIII's "Roots" album, he is unable to point to even a scintilla of evidence that he sustained any monetary injury as a consequence. And the district judge made no findings which support the conclusion that Adam VIII's and Levy's alleged invasion of Lennon's rights of publicity and privacy caused him $35,000 in damages.*

The plethora of cases Lennon cites is wholly inapposite to the only issue in question. Levy and Adam VIII do not deny that an unauthorized use of an artist's name and likeness violates Section 51 of the New York Civil Rights Law; they dispute that such use in fact caused Lennon injury, and the cases on which Lennon purports to rely shed no light on that matter.**

While this Court held in Manger v. Kree Institute of Electrolysis, 233 F.2d 5 (2d. Cir. 1956), that recovery for injury to reputation should not be denied because the amount of such damages may be difficult

---

* Indeed, the district court specifically rejected the argument that "Roots" would have an adverse impact on the sale of subsequently released Lennon albums (A.3472).

** Since Lennon attempts to make much of the fact that Adam VIII's and Levy's trial counsel were also the counsel for actor Cary Grant in Grant v. Esquire, Inc., 357 F.Supp. 876 (S.D.N.Y. 1973), and asked for a large amount of compensatory and punitive damages for the unauthorized use of Grant's name and likeness, it should be noted that the decision in that case held only that Grant had a cause of action, not that he was entitled to significant damages. Indeed, the district judge expressed some skepticism that Grant would be able to prove substantial damages (Id. at 880) and the case was never tried but was settled out of court.

to ascertain, it made no suggestion that damages should be granted absent proof that the claimant's reputation had in fact been damaged. For a detailed discussion of the different standards of proof required to establish damages and their amount, see Levy's main brief, pages 17 and 18.

To the extent that Lennon complains about his emotional distress,* it should be pointed out that Lennon admitted that he never even listened to the "Roots" album until the trial (A.972). As for the physical appearance of the "Roots" cover and television commercials (Exhibits PX 34 and 103), we respectfully invite the Court to look at them. They may not be great works of art but, by the same token, they are not the "atrocious" and "ugly" products described by defendants. They are rather typical television packages designed to appeal to a television-type mail order audience. (Compare Exhibits PX 82D and CI-4). The cover is an accurate representation of Lennon's likeness at the time (A. 1945-1946). As for the television commercials, although defendants criticize them, the trial court made no adverse finding.

We therefore continue to submit that Lennon simply failed to meet his burden of proof that he suffered any compensable injury and that the trial court erred in awarding him substantial money damages in addition to injunctive relief.

---

* In response to our argument that Lennon's own prior albums ("Two Virgins" and "Unfinished Music No. 2") demonstrated either that Lennon does not care about his reputation or that his reputation among his fans is impervious to the appearance of his covers, Lennon's counsel make the absurd response, at page 69, footnote 2, that the position of Levy and Adam VIII was "nullified" when their trial attorney asked Lennon to autograph the "Two Virgins" album cover (A.1951). For Lennon's counsel to make such an argument seriously is indeed a mark of their desperation on this issue. The transcript shows that this request, which came during one of the few light moments in a hard fought trial, was made in response to Lennon's assertion that he is willing to give anyone an autograph (A.1942) and his further testimony that the head of EMI, after refusing to market "Two Virgins" because of its vulgarity, nevertheless asked Lennon to autograph it for him (A.1950).

REPLY TO POINT V OF DEFENDANTS' BRIEF

(Punitive damages)

Lennon is in error both when he claims (without citation to Judge Griesa's opinion) that the primary basis for his award of punitive damages was Levy's and Adam VIII's alleged violation of the Civil Rights Law and when he states that the punitive damage standards articulated by the New York Court of Appeals in Walker v. Sheldon, 10 N.Y.2d 401 (1961), are inapplicable in this case. Lennon also misrepresents the import of Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354 (1976), when he cites that case for the proposition that different standards apply for the imposition of punitive damages in situations where such damages are authorized (not mandated) by statute.*

Since Judge Griesa awarded Lennon, Capitol and EMI punitive damages in the identical amount of $10,000 each, and since the district court did not allocate what portion of Lennon's award was for violation of his rights of publicity and privacy, and since Judge Griesa did not indicate that he applied different legal standards to determining Lennon's entitlement to punitive damages on his Civil Rights claim from those used in deciding that Lennon, Capitol and Apple all deserved punitive damages for Adam VIII's and Levy's alleged infringement of their rights, Lennon's right to punitive damages must rise or fall along with Capitol's and EMI's right.

Contrary to Lennon's unsupported contention (Defendants' brief,

---

* Garrity v. Lyle Stuart, Inc., supra, involved the question of whether a private arbitrator could award punitive damages. The Court of Appeals held he could not, on the ground that it would be contrary to public policy to allow anyone but the state to punish wrongdoers. In passing, Judge Breitel observed that in the absence of a statute, the New York courts had awarded punitive damages only in a limited variety of cases. He did not suggest that the standards for determining the appropriateness of punitive damages in a type of action where they were permitted varied depending on whether such damages were authorized by statute or common law.

p.81), the Court of Appeals, in Walker v. Sheldon, did not impose more stringent requirements for imposition of punitive damages in fraud cases than in other areas of the law, and subsequent decisions construing New York law have drawn no such distinction. See e.g., American Electronics, Inc. v. Neptune Meter Co., 30 A.D.2d 117 (1st Dept. 1968) (unfair competition and misappropriation of property); Huschle v. Battelle, 33 A.D. 2d 1017 (1st Dept. 1970), aff'd., 31 N.Y. 2d 768 (1972) (misappropriation of trade secrets). In fact, in Price v. Hal Roach Studios, Inc. 400 F.Supp. 836 (S.D.N.Y. 1975), a Civil Rights case relied on by Lennon, the district court, in the very footnote referred to by Lennon, cites James v. Powell, 19 N.Y.2d 249 (1967), a fraud case in which the Court of Appeals explicitly followed Walker v. Sheldon, as the controlling authority on punitive damages.

As discussed in detail in Levy's main brief, the evidence falls far short of establishing that Levy and Adam VIII acted wilfully, wantonly, maliciously or with recklessness bordering on criminality, the requirements set by Walker v. Sheldon, supra, particularly since proof of such heinous misconduct must be "clearly established", Cleghorn v. New York Cent. & H.R.R., 56 N.Y. 44, 48 (1874).

REPLY TO POINT VI OF DEFENDANTS' BRIEF

(Avoidance of Damages)

Due to space limitations, we will not reply to Lennon's avoidance of damages argument. We rely on the argument made at pages 46-51 of Levy's main brief, but we do note that it ill behooves Lennon of all people who, together with his agent, Seider, played fast and loose with both Levy and Capitol, to claim that he should be entitled to over $145,000 of damages resulting from a situation he and Seider could and should have avoided.

CONCLUSION

For the reasons stated in the main and reply brief submitted on behalf of Big Seven, Adam VIII and Levy, the judgment awarding defendants compensatory and punitive damages on their counterclaims should be reversed in all respects.

Dated: January 24, 1977

Respectfully submitted,

NEMEROFF, JELLINE, DANZIG, PALEY,
MANDEL and BLOCH
Attorneys for Additional Defendant
on Counterclaims-Appellant
Morris Levy
350 Fifth Avenue
New York, New York 10001
(212) 947-6760

Melvyn Altman,
Of Counsel

UNITED STATES COURT OF APPEALS
for the Second Circuit

BIG SEVEN MUSIC CORP. and ADAM VIII, Ltd.,

Plaintiffs-Appellants,

against

JOHN LENNON, APPLE RECORDS, INC., HAROLD SEIDER, CAPITOL REOCRDS, INC. and EMI RECORDS LIMITED,

Defendants-Appellees,

and

MORRIS LEVY,

Additional Defendant on Counterclaims-Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Antonio Ramos, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 10 Catherine Street, New York, NY 10038
That on January 24, 1977, he served 2 copies of Reply Brief

on Cleary, Gottlieb, Steen & Hamilton, Esqs.
One State Street Plaza
New York, NY

Walter, Conston, Schurtman & Gumpel, P.C.
280 Park Avenue
New York, NY

Marshall, Bratter, Greene, Allison & Tucker, Esqs.
430 Park Avenue
New York, NY

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Antonio Ramos

Sworn to before me this
24 day of January, 1977

John V. Esposito

JOHN V. ESPOSITO
Notary Public, State of New York
No. 1977
Commission Expires